No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AS *AMICUS CURIAE* OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee?

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INTEREST OF THE *AMICUS CURIAE*

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management.[1] Representing more than 210,000 individual members, SHRM's mission is to serve the needs of human resource professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

If the decision below, as well decisions in other circuits on the same issue, were left undisturbed, SHRM's members in the human resource profession would face a two-fold dilemma. First, the lower court's opinion would require an independent investigation when none may be needed. Second, the Tenth Circuit's requirement that an investigation be "adequate" does not furnish human resource professionals with a clear statement of their minimum legal requirement.

SHRM's members seek a principled standard that is rooted in Title VII's statutory prohibition against an employer taking an adverse action against an employee with discriminatory intent. SHRM's members have an interest in a standard that preserves the human resource professional's ability to determine whether and what kind of investigation is necessary. Finally, SHRM's members have an interest in a

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[1] Pursuant to Rule 37.6, *amicus* states that this brief was authored in whole by counsel for the Society For Human Resource Management. This brief was not authored in any part by counsel for a party to this matter. No person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

judicial standard that provides clear guidance to the human resource manager when conducting an investigation that does not leave open the possibility that a court will second guess the adequacy of the investigation.

There are three elements of the Tenth Circuit's opinion that are pertinent to SHRM and its members. First, the Tenth Circuit held that "a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action." *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 488 (10th Cir. 2004). Second, the Tenth Circuit held that that "an employer can avoid liability by conducting an independent investigation of the allegations against an employee." *Id.* at 488. Third, the Tenth Circuit rejected BCI's investigation as "inadequate, as a matter of law" for breaking the causal link between Mr. Grado's alleged bias and Mr. Peters' termination. *Id.* at 492. The Tenth Circuit held that BCI Coca-Cola's investigation was inadequate because Ms. Edgar never sought any other version of events. *Id.* at 493. The Tenth Circuit reasoned that "asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory." *Id.* at 488.

STATEMENT OF THE CASE

The United States Equal Employment Opportunity Commission (EEOC) filed a claim on behalf of Stephen Peters, an employee at the BCI Coca-Cola Bottling Company of Los Angeles. Mr. Peters was the most senior merchandiser at BCI Coca-Cola's Albuquerque, New Mexico, facility, and he enjoyed the best shifts, which included Saturdays and Sundays off. *Id.* at 478.

On Friday, September 28, Mr. Peters' supervisor, Cesar Grado, instructed Mr. Peters to report to work on Sunday, September 30, 2001. *Id.* at 479. Mr. Peters refused. *Id.* Because the human resource professional for the Albuquerque facility, Sherry Pederson, was not at work that day, Mr.

Grado sought advice from Pat Edgar, the human resource professional in BCI Coca-Cola's Phoenix, Arizona, facility. *Id.* Upon Ms. Edgar's instruction, Mr. Grado informed Mr. Peters that he needed to work on Sunday and that his refusal would be insubordination that "could lead to termination." *Id.* Mr. Peters "started yelling," and his final response to Mr. Grado was, "[D]o what [you] got to do and I'll do what I got to do." *Id.* (alteration in original).

Mr. Grado again contacted Ms. Edgar and informed her that he had asked Mr. Peters to describe his weekend plans, and that Mr. Peters had refused, saying they were "none of [Mr. Grado's] business." *Id.* at 480. Mr. Grado also recounted Mr. Peters' final remarks ("Do what you got to do"), which Ms. Edgar determined to be insubordination. *Id.* Ms. Edgar, however, did not make the decision to terminate Mr. Peters at that time. *Id.*

Mr. Peters did not report to work on Sunday. Instead, he went to a walk-in urgent care clinic on Saturday evening with complaints of a headache, sinus pain, and a cough. *Id.* "A doctor diagnosed him with a sinus infection, gave him a prescription, and directed him not to return to work until Monday, October 1." *Id.*

On Monday morning, October 1, Ms. Edgar held telephone conferences with Ms. Pederson and Mr. Grado to discuss Mr. Peters' conduct the previous Friday. *Id.* During those conferences, Mr. Grado informed Ms. Edgar that Mr. Peters did not appear for work on Sunday. Additionally, Ms. Pederson reviewed Mr. Peters' personnel file and found a Disciplinary Status Notice for an event in 1999 that resulted in Mr. Peters receiving a two day suspension and "final warning" for insubordination. *Id.* (The facts of the 1999 incident were strikingly similar to the instant case. *Id.* In the 1999 event, Mr. Peters was asked on a Friday to work on his weekend day off, and his response was a "rude and unprofessional" refusal. *Id.* at 480.)

By the end of Monday, October 1, Ms. Edgar made her final decision to terminate Mr. Peters for insubordination. *Id.* It is undisputed that Ms. Edgar did not know Mr. Peters' race, and no party suggests that either Ms. Edgar or Ms. Pederson harbored racial animus against Mr. Peters. *Id.* at 481.

On October 11, Mr. Peters filed an EEOC complaint of race discrimination, and on December 30, 2002, the EEOC filed suit on his behalf in the United States District Court for the District of New Mexico. *Id.* at 482. The EEOC based its case on the theory that Mr. Grado harbored discriminatory animus towards African Americans and that his animus should be imputed to BCI Coca-Cola because Mr. Grado had "substantial involvement" in Mr. Peters' firing. *Id.* at 482. The district court granted BCI Coca-Cola's motion for summary judgment on the ground that Mr. Grado's involvement in Mr. Peters' firing was too remote to permit any bias he may have held to be imputed to BCI Coca-Cola. *Id.* at 483.

The EEOC appealed to the Tenth Circuit, which reversed the district court's judgment. The Tenth Circuit held that the employer should be liable if the biased subordinate supervisor *caused* the employer to terminate an employee. *Id.* at 488. Implicitly, the Tenth Circuit also held that the employer may break that causal connection by conducting an "adequate investigation," which must at least contain an interview of the employee to elicit his side of the story. *Id.* at 491-92. There is also language in the Tenth Circuit's opinion that suggests an "adequate investigation" must also contain a thorough review of the employee's personnel file. *Id.* at 492.

SUMMARY OF ARGUMENT

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et. seq.*, the disparate treatment standard prohibits adverse action with the intent or motive to discriminate. The words "intent" and "motive" are used interchangeably in Title VII jurisprudence. In creating a disparate treatment claim, Congress' did not enact a statute of strict

liability and did not prohibit or seek to penalize conduct void of discriminatory intent. However, under the Tenth Circuit's holding in this case (as well as holdings from the Seventh Circuit and other Circuit Courts of Appeal) makes an employer liable for the concededly unknown biased motive of a subordinate. In so holding, the Tenth Circuit improperly relieves the plaintiff of his burden of showing that a decisionmaker took an adverse employment action with the statutorily required discriminatory motive.

SHRM recognizes the value of a taking a considered approach to termination. SHRM agrees with the Tenth Circuit that there are instances in which asking an employee his side of a story would illuminate a human resource professional's decisionmaking. However, SHRM does not agree with the Tenth Circuit that an employer could be liable under Title VII based upon the actions of a human resource professional simply because a subordinate supervisor harbored a discriminatory motive unknown to the human resource professional. This would deprive an employer of well-established defenses such as the presence of a legitimate nondiscriminatory reason for an adverse action, a business necessity, or the uniform application of a neutral policy.

There is an abundance of authority that limits disparate treatment liability under Title VII to an adverse action born of discriminatory motive. Thus, whether a supervisor "caused" the employer to terminate an employee is irrelevant to a disparate treatment case under Title VII. Further, a causation analysis sweeps too broadly because, arguably, most or all adverse actions can trace their causal roots, directly or indirectly, to a supervisor's initiative.

In disparate treatment cases, SHRM proposes that a more precise inquiry focuses upon the decisionmaker's motives and upon whether the decisionmaker acted independently of a biased subordinate.

SHRM understands the subtlety and complexity of assessing liability in instances when a supervisor is involved in an adverse action. The test adopted should focus upon whether the neutral human resource manager's decision was *independent* of the supervisor's biased report.

As a converse of the proposition that the formal decisionmaker was independent of the supervisor, the judicial inquiry should ask whether the supervisor's report and the strength of his advocacy for termination rose to such a level that the human resource manager acted interdependently with the supervisor such that they collectively performed the decisionmaking function. SHRM asserts this was the case in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), discussed below.

In the instant case, the Tenth Circuit requires an "adequate investigation" to break a causal connection between the supervisor and decisionmaker. While an investigation is certainly one way to demonstrate that the human resource professional's decision was independent of the supervisor's bias, the Tenth Circuit extends this proposition too far for two reasons.

First, Title VII cases have consistently held that a court will not second guess the adequacy of an employer's conduct, because courts have consistently refused to serve as an employer's "super-personnel" department. Hence, the Tenth Circuit erred in concluding that, although Ms. Edgar conducted an investigation, it was inadequate as a matter of law.

Second, a human resource professional does not have to conduct an investigation in all circumstances to establish that she acted independently of a supervisor. For example, an investigation is not necessary when an employee's terminable offense is open, apparent, and obvious. Similarly, no investigation is needed when a company has an automatic termination policy, such as a zero-tolerance policy for guns or drugs, a three-strikes policy, or a uniformly applied no-fault

absence policy. In the instant case, Mr. Peters' 1999 "final warning" constituted the basis for automatic termination under the employer's uniform policies.

Similarly, when a human resource manager monitored and counseled a situation as it unfolded, no further investigation may have been needed at the situation's critical moment. This was the circumstance the instant case.

In addition, SHRM notes that the Tenth Circuit's decision does not reflect the realities of workplaces, particularly those of larger employers. A trend amongst many employers is to decentralize the human resource functions in a variety of ways. At other workplaces, human resource departments are opting to train responsible senior staff in traditional human resource functions, such as performance appraisals and investigations. The Tenth Circuit decision fails to provide employers with the flexibility structure a corporate architecture that serves an employer's unique challenges.

ARGUMENT

I. DISPARATE TREATMENT CASES REQUIRE A SHOWING THAT AN EMPLOYER INTENDED TO DISCRIMINATE.

Under Title VII, an employee may bring either a claim of disparate impact or of disparate treatment against an employer. *E.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617 n.2 (1999) (Thomas, J., dissenting) ("This Court has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact."). *See also Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005) (Where plaintiff brought both a disparate treatment claim and a disparate impact claim). The instant case involves a claim of disparate treatment, as do all of the cases in the federal circuit courts that involve the issue of subordinate supervisory bias.

For a plaintiff to survive summary judgment in a disparate treatment claim, he must show that the decisionmaker, not just any employee, took adverse action with discriminatory intent. *E.g.*, *Reeves*, 530 U.S. at 143; *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In *Reeves*, this Court held that the ultimate question is whether the employer intentionally discriminated. 530 U.S. at 146. In *Reeves*, the first step in this Court's analysis was to determine the motives of the various formal decisionmakers. This Court noted that there were no allegations that two of the formal decisionmakers in *Reeves* were motivated by age. 530 U.S. at 140. Thus this Court's focus was upon the motives of the formal decisionmaker and upon who should be deemed an actual decisionmaker, and not upon the motives of just any employee.

The element of motive or intent is integral to a disparate treatment claim under Title VII. *See Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2408 (2006) ("Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory . . . and punitive damages"); *Reeves*, 530 U.S. at 143; *Burdine*, 450 U.S. at 256; *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 278-79 (1979); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989). In *Reeves*, this Court held that "'liability depends on whether the protected trait . . . actually motivated the employer's decision.'" 530 U.S. at 141 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court held that the plaintiff could show that McDonnell's proffered reason for refusal to rehire was merely pretext by showing that McDonnell Douglas exhibited racial discrimination during Mr. Green's previous employment, or by showing that McDonnell Douglas rehired whites with a similar criminal background. Mr. Green was arrested and convicted for illegally blocking traffic at the entrance of McDonnell Douglas' worksite. He then applied for

reemployment. Thus, the burden remains with the plaintiff to show that the person taking an adverse action took a protected status into consideration. *See Reeves*, 530 U.S. at 143 (holding that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") (alteration in original) (internal quotations omitted).

This Court has held that to show intentional discrimination, a plaintiff must show that the "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" the protected characteristic. *Feeney*, 442 U.S. at 279 (1979). In *Feeney*, in evaluating a discrimination claim under 42 U.S.C. § 1983, this Court explained that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.*

SHRM argues that the courts that have adopted a "cat's paw" style of causation analysis detoured from Title VII jurisprudence because they allow a plaintiff to establish disparate treatment without requiring the plaintiff to show that the decisionmaker made his decision "because of," with intent regarding, or with motive regarding, the plaintiff's protected status.

Instead, these courts allow the plaintiff to graft the discriminatory motive of one person onto the adverse action of a neutral other. This erroneous detour, starting with the Seventh Circuit in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), has been followed to some extent by the Fifth Circuit in *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000), and the Tenth Circuit in the instant case. However, the approach taken by these courts cannot be reconciled with either Title VII's intent requirement or this Court's recent decision in *Reeves*.

A. Title VII Disparate Treatment Claims Require Intent Whereas A Plaintiff May Disregard Intent In Disparate Impact Claims

In *Shager*, the Seventh Circuit stated that "[t]he common law rule is that an employer is liable for intentional torts of its employees committed in furtherance of their employment." 913 F.3d at 404. SHRM disagrees with this broad statement of law which forms the basis for the Seventh Circuit's "cat's paw" causation analysis. Although an employer usually will be liable for an employee's negligence tort committed within the scope of employment, an employee's intentional tort is not necessarily imputed to the employer because, by definition, the act may be outside the scope of employment. Congress expressly required an analysis focused on intent for Title VII disparate treatment claims. The Seventh Circuit's opinion in *Shager* began the detour into causation analysis, and it erred in imposing a causation analysis in disparate treatment claims.

Title VII's prohibition against disparate treatment is based on a discriminatory motive or intent by the person or individuals taking an adverse action. This is the essence of a disparate treatment claim. *E.g.*, *Burlington Northern*, 126 S. Ct. 2405 at 2417 ("Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory . . . and punitive damages").

In contrast to disparate treatment claims, which are arguably claims under a statutory intentional tort, disparate impact claims arguably arise from a statute of strict liability since the question of violation centers upon the result and disregards intent. Thus, disparate impact claims recognize that an employer may violate Title VII even without intending to discriminate. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Causation does not appear to be an element of intentional torts, although it is relevant in negligence, and in fact would short circuit the plaintiff's burden to prove intent.

In the instant case, the Tenth Circuit adopted the Seventh Circuit's causation approach and held that BCI Coca-Cola could be liable—despite Ms. Edgar's lack of discriminatory intent—if Mr. Grado's alleged bias caused Mr. Peters' termination. To subject BCI Coca-Cola to liability under Title VII when all parties concede that the decisionmaker lacked intent to discriminate would be to treat all disparate treatment claims as disparate impact claims; that is, essentially as claims of strict liability. However, as discussed above, Title VII does not permit a court to ignore the decisionmaker's intent in disparate treatment cases.

B. Title VII Defines An Employer To Include An Agent Of The Employer. The "Agent" In Subordinate Supervisor Cases Is The Formal Decisionmaker, Not The Subordinate Supervisor

Title VII defines an "employer" as a person engaged in an industry affecting commerce and any agent of that person. 42 U.S.C. § 2000e(b). An agency relationship exists when a principal assents to another acting on the principal's behalf. Restatement (Third) of Agency § 1.01 (2006). An agent acts with actual authority when the agent "reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Id.* at § 2.01. In addition to action, agency is defined by authority to act. *Id.* at §§ 2.01, 3.05.. Any person may ordinarily be empowered to act as an agent so as to affect the legal relations of another. *Id.* at § 3.05.

In the case at hand, Mr. Grado was not the agent of BCI Coca-Cola for purposes of Title VII because he did not take the adverse action against Mr. Peters. Also, BCI Coca-Cola did not give Mr. Grado authority to discipline or terminate his subordinates. It therefore did not assent to have Mr. Grado act on its behalf. The one who took the adverse action was Mr. Edgars, the human resource professional. She was the agent of BCI Coca-Cola since she had actual authority to terminate employees on behalf of BCI Coca-Cola.

In the leading subordinate bias, or "cat's paw," cases, including the instant case, it is not in dispute that the allegedly biased supervisor did not have authority to take adverse employment on behalf of the employer. *BCI Coca-Cola*, 450 F.3d at 479; *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 282 (4th Cir. 2004); *McKinney*, 235 F.3d at 224; *Shager*, 913 F.2d at 405. Thus, the Seventh Circuit and others err when they look to Title VII's language defining an employer as "any agent" of the employer and conclude that the subordinate supervisor could be that agent despite his undisputed lack of authority to discipline or terminate.

C. Plaintiffs Must Show Discriminatory Motive By The Person Committing The Adverse Action. A Plaintiff May Not Make A Disparate Treatment Case By Grafting One Person's Discriminatory Motive To Another Person's Adverse Action

Since a plaintiff is required to show that the actual decisionmaker had motive to discriminate, the "cat's paw" cases would be easy to dispense with simply by showing that the formal decisionmaker was neutral. In all of these cases, the parties do not dispute the formal decisionmaker's lack of bias. These cases are not easy to resolve, however, because the formal decisionmaker's level of interdependence with other persons in arriving at a decision varies from case to case.

A disciplined application of recognized disparate treatment law would not permit a plaintiff to prevail by showing that bias resided in one person, and an adverse action was taken by another person, and thus, combined, they violated Title VII.

D. Because A Plaintiff Must Show That A Person Or Persons Took An Adverse Action With Discriminatory Motive, The Court's Inquiry Should Center Upon The Independence Of The Formal Decisionmaker, And Not Upon Whether An Allegedly Biased Person *Caused* Another To Take An Adverse Action

The legal standard used must look to the intent of the decisionmaker. The Tenth Circuit's standard, however, focuses on the person with bias. The legal standard and the person a test focuses upon must match. In other words, the test must arise from the standard. The proper test is one that focuses on the intent of the decisionmaker, not on the bias of the subordinate,

In *Shager* and *McKinney*, the courts' inquiries focused upon the supervisor and whether his report of an employee's conduct caused or influenced the neutral decisionmaker's decision. *Shager*, 913 F.3d at 405; *McKinney*, 235 F.3d at 226. Their inquiry incorrectly focuses upon the impact created by the biased supervisor.

Since Title VII only prohibits conduct by the employer and its agent, the neutral decisionmaker, the inquiry should focus upon the neutral decisionmaker. A test better rooted in Title VII's requirement of discriminatory intent would evaluate who is or are the decision makers, and whether the decisionmaker arrived at her decision independently of the biased supervisor.

If the decisionmaker's decision was not independent, but rather was so dependent upon the supervisor, that the supervisor and the formal decisionmaker acted interdependently, then the court may conclude that the supervisor is one of a collaborative of decisionmakers.

First, the causation analysis adopted by the Seventh and Tenth Circuits assumes as a premise that a court is permitted in the first instance to graft one person's bias onto an admit-

tedly non-biased person. This premise has no roots in Title VII jurisprudence. Title VII prohibits an adverse action because of an individual's protected status. 42 U.S.C. § 2000e-2. This Court has construed the words "because of" to mean that protected status must be irrelevant to the employment decision. *Price Waterhouse*, 490 U.S. at 240. In *Price Waterhouse*, the Court held that to construe "because of" to mean "but-for causation" "is to misunderstand" the statutory language. *Id.* A but-for causation analysis, the Court held, incorrectly asks whether an employer would have terminated if the protected status was not present. *Id.* According to the Court, the critical inquiry is "the one commanded by the words of" Title VII—whether protected status "was a factor in the employment decision *at the moment it was made*." *Id.* at 241.

Cautioning that we "need not leave our common sense at the doorstep when we interpret a statute," the Court reasoned that in drafting the words "because of," Congress did not require a plaintiff to identify a precise causal role played by discriminatory motives. *Id.* at 241. Rather, the court concluded that Congress intended to require a plaintiff to prove that the employer "relied upon sex-based considerations in coming to its decision." *Id.* at 241-42. Congress did not intend to allow a plaintiff to take a short cut in his burden by attributing a supervisor's bias to an employer merely because the supervisor was a but-for cause of a particular result. Instead, Congress intended a more rigorous burden to show improper considerations were a factor in the decision.

Second, the use of causation analysis is overbroad as an analytical tool since a termination decision almost always is prompted by a supervisory report to a neutral decisionmaker. The supervisor sets in motion a series of events that directly or indirectly lead to termination and thus, to a greater or lesser extent always has some causative effect upon the termination. This approach does not inform the court as to whether the employer disparately treated an employee.

A more precise analytical test would be one rooted in Title VII's requirement that a plaintiff must show that a decisionmaker took adverse action with discriminatory motive.

The question that arises when a neutral decisionmaker decides to terminate an employee on the basis of a supervisor's report is not whether the supervisor caused the decision, but rather whether the supervisor's role in the termination rises to such a level of involvement that the supervisor was one of the collective decisionmakers. This is a clear holding of *Reeves*, and it seems to be implicit in the Fifth Circuit's holding in *McKinney*.

As part of the *McDonnell Douglas* burden-shifting paradigm, an employer may present evidence that the decisionmaker was not biased. *Reeves*, 530 U.S. at 142. This point rests on a debatable presumption that the formal decisionmaker is the only decisionmaker. The plaintiff may attempt to show that the employer's proffered reasons are merely pretextual by showing that the formal decisionmaker did not act alone. The plaintiff may establish that the supervisor was so involved in the process leading to the decision that the supervisor's biased conduct, together with the formal decisionmaker's adverse action, were interdependent and that the supervisor and the formal decisionmaker collectively terminated the employee. This manner of framing the issue focuses the analysis upon the level of interdependence between the biased supervisor and the formal decision maker rather than upon causation.

If the facts present at the summary judgment stage are such that there can be no genuine dispute that the formal decisionmaker acted independently of the supervisor's report, then the court should decide, as a matter of law, that the bias of the supervisor may not be attributed to the employer.

There are a number of types of factual situations in any case that, if not in genuine dispute, should permit a court to determine as a matter of law that the decisionmaker acted

independent of the supervisor's report. We examine those types of factual situations in Section II below.

E. If We Look to Whether The Formal Decisionmaker Took Adverse Action *Independently* Of The Person Who Harbored Discriminatory Motive, The Various Circuits' Results Would Appear Logical And Consistent

A comparison of the very different factual circumstances in *Shager*, *McKinney*, *Reeves*, and *Lockheed Martin* illuminates the circuit courts' different approaches to subordinate supervisor bias.

The courts have refused to dismiss a plaintiff's discrimination claim when a supervisor engaged in an ongoing dialogue with a formal decisionmaker in an effort to recommend and, in some cases, to strongly advocate or pressure, the formal decisionmaker to terminate the employee. *Reeves*, 530 U.S. at 138; *McKinney*, 235 F.3d at 224; *Shager*, 913 F.2d at 400. In contrast, in cases in which a supervisor merely reported an incident or sought guidance from the human resource department, the courts have granted summary judgment to the employer. *Lockheed Martin*, 354 F.3d at 282. We note that in the instant case, Mr. Grado did not recommend termination, but merely sought guidance from and reported facts to Ms. Edgars. *BCI Coca-Cola*, 450 F.3d at 479.

In cases where the decision to terminate was based upon objective grounds such as safety, absence, insubordination, or where the employee had not contested the basis for termination, the courts have granted summary judgment to the employer. In *Lockheed Martin*, for example, the termination grounds of safety violations and tool management were objective and Ms. Hill did not dispute them. 354 F.3d at 282-83.

In contrast, when the purported ground for termination was subjective, such as a performance evaluation, or where the plaintiff disputed the termination basis, the courts have

denied judgment as a matter of law for the employer. *Shager*, 913 F.2d at 406; *McKinney*, 235 F.3d at 230. In this case, Mr. Peters did not dispute that he refused to work on Sunday or that he said, "do what you got to do."

When an employer conducted any degree of inquiry, the courts have tended to dismiss the case at summary judgment. In *Lockheed Martin*, the employer reviewed the disciplinary reports and the personnel file. 354 F.3d at 282. By contrast, where the supervisor so strongly advocated for termination that the decisionmaker accepted the supervisor's judgment without inquiry, the courts have allowed the plaintiff to proceed to trial. In *McKinney*, the supervisor, who was related to the owner, threatened to quit if the plaintiff was not terminated. 235 F.3d at 224. In *Reeves*, this Court found that the supervisor, Mr. Chesnut, wielded absolute authority and strongly lobbied for the plaintiff's termination to the owner, his wife. 530 U.S. at 152. In the instant case, there was no dispute that Ms. Edgar did conduct some inquiry. *BCI Coca-Cola*, 450 F.3d at 492.

Thus, the elements of a standard announce themselves by an examination of the facts at summary judgment in the cases at issue. Such a standard must be consistent with the Title VII jurisprudence described above, which requires the person who takes an adverse action must be the one who harbors the discriminatory motive.

II. DIFFERENT FACTUAL SITUATIONS REQUIRE A MORE FLEXIBLE APPROACH TO DETERMINING THE INDEPENDENCE OF THE FORMAL DECISIONMAKER

There are three common factual scenarios that drive litigation under the discrimination laws. In the first class of cases, the formal decisionmaker harbors the animus, and the plaintiff alleges that his decision was motivated by that animus. *See, e.g., McDonnell Douglas*, 411 U.S. 792 (1973). In these cases, the formal decisionmaker's animus is rightly im-

puted to the employer because the formal decisionmaker is the employer's agent.

In the second class of cases, the biased individual has no supervisory or disciplinary authority over the employee against whom adverse action is taken. Expressions of animus by these individuals are mere "stray remarks," and they may not be imputed to the employer. In *Price Waterhouse*, 490 U.S. at 277, this Court stated that stray remarks, "cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard."

Although the Fourth Circuit did not characterize it as such, the facts of *Lockheed Martin* fall within the "stray remarks" doctrine. In that case it was undisputed that the allegedly biased safety inspector who reported Ms. Hill's violations of company policy had no supervisory or disciplinary authority over Ms. Hill. *Lockheed Martin*, 354 F.3d at 282. Rather, the safety inspector merely reported violations to Ms. Hill's supervisor, who possessed disciplinary—but not termination—authority. *Id.* It was also undisputed that none of Hill's four direct supervisors harbored any age-based animus. *Id.* at 282-83. Using similar reasoning to the "stray remarks" doctrine of *Price Waterhouse*, the Fourth Circuit rightly concluded that the safety inspector's bias could not be attributed to the employer. *Id.* at 296.

In the third class of cases, where we presently finds ourselves, a biased supervisor without termination authority, reports to someone up the chain of command who possesses termination authority. The Seventh and Tenth Circuits have adopted a causation analysis to determine whether the supervisor's bias may be imputed to the employer, but, as discussed above, this analysis is misplaced.

The approach more faithful to Title VII is to follow the Court's analysis in *Reeves* and look to the independence of the formal decisionmaker's action. In *Reeves*, Ms. Sanderson was the formal decisionmaker who fired Mr. Reeves, but evidence presented by Mr. Reeves showed Mr. Chesnut also to be a decisionmaker. *Reeves*, 530 U.S. at 152. The Court implicitly determined that Ms. Sanderson did not act independently but rather acted *inter*dependently with Mr. Chesnut. *Id.* Once the Court was satisfied that Mr. Chesnut was a decisionmaker, it followed that his animus could be imputed to the employer.

The approach SHRM advocates here does not require a determination of who the principal decisionmaker is, for there may be several decisionmakers who all played an equal role throughout the chain of command. SHRM proposes that the court identify the individual or the group of individuals who acted as the decisionmakers. Because the formal decisionmaker will always be included in this class, the most practical approach is to look to facts not in dispute to show that the formal decisionmaker made an independent decision. If the formal decisionmaker acted independently, then only her animus may be attributed to the employer. However, if the formal decisionmaker did not make an independent decision, at least one other employee is necessarily part of an interdependent decision, and that person's animus may be imputed to the employer.

To determine independence at the summary judgment stage, courts may look to several undisputed facts in the record. For example, the fact that the formal decisionmaker conducted an inquiry as defined below would always be sufficient to show the independence of the formal decisionmaker. However, an inquiry is not always necessary. Factual situations vary widely and the law should permit human resource managers the flexibility to deal with cases in the most efficient and appropriate method. In these cases, courts

should defer to the business judgment and experience of human resource professionals.

A. The Formal Decisionmaker May Demonstrate Its Independence By Conducting An Inquiry

The effect of the Tenth Circuit's holding in *BCI Coca-Cola* is that a defendant cannot prevail on summary judgment unless it conducted an investigation that was "adequate" as a matter of law. In the court's view, an adequate investigation must consist, at a minimum, of asking the employee for his side of the story. *BCI Coca-Cola*, 450 F.3d at 488, 492. Because Ms. Edgar did not directly ask Mr. Peters his side of the story prior to his termination (although she did indirectly through Mr. Grado, *id.* at 492), the Tenth Circuit held that BCI Coca-Cola did not conduct an adequate investigation and the court reversed the district court's grant of summary judgment. The Tenth Circuit's holding is wrong for two reasons.

First, the Tenth Circuit's "adequate investigation" standard is overbroad. It erroneously imposes a strict legal standard for a fact question best left to the discretion of human resource professionals. If the Tenth Circuit's holding is left undisturbed, human resource professionals will not have the flexibility to apply their business judgment and experience to unique factual situations. In addition, permitting a determination of an investigation's "adequacy" amounts to judicial second guessing. Moreover, although an inquiry is sufficient to establish a formal decisionmaker's independence, in some circumstances, no inquiry is needed.

A human resource professional's decision whether to perform an inquiry is precisely the discretion protected by the super-personnel doctrine. In *Pippin v. Burlington Resources Oil and Gas Co.*, the Tenth Circuit held that it "will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives." 440 F.3d 1186, 1197 (10th Cir. 1988) (quoting *Branson v. Price River*

Coal Co., 853 F.2d 768, 772 (10th Cir. 1988)). Similarly, in *Bender v. Hecht's Department Stores*, the Sixth Circuit held that it was improper for a court to act "as a super personnel department, overseeing and second guessing employers' business decisions." 455 F.3d 612, 627-28 (6th Cir. 2006) (internal quotations omitted). The Eighth Circuit opined in *Stallings v. Hussman Corp.* that "we are mindful that we do not sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." 447 F.3d 1041, 1052 (8th Cir. 2006). Similarly, in *Millbrook v. IBP, Inc.*, the Seventh Circuit explained that "a court's role is to prevent unlawful hiring practices, not to act as a super personnel department that second-guesses employers' business judgments." 280 F.3d 1169, 1181 (7th Cir. 2002) (internal quotations omitted).

The super-personnel doctrine derives from the well-established business judgment rule, which this Court has recognized. *E.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 (1991); *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 520 (1984); *Burks v. Lasker*, 441 U.S. 471, 474 (1979). The requirement of performing an adequate investigation imposes an inefficient and undue burden on employers, and it unnecessarily forces a process upon them in instances when they, as experts, may determine that a different solution is preferable.

The Tenth Circuit conceptualized a flawed definition of "investigation." A more precise test would allow a formal decisionmaker to conduct an *inquiry*, which is the minimum necessary for establishing that she arrived at her decision independently. SHRM proposes that this "inquiry" be defined as any active search for and discovery of evidence probative of the reliability of the supervisor's report or stated grounds for an adverse employment action.

If the formal decisionmaker makes such an inquiry, then she has established that she independently made her decision,

and the supervisor's animus is not imputed to the employer. This standard is consistent with the super personnel doctrine's deference to business judgment because it preserves an employer's discretion in tailoring its inquiry according to the unique facts presented.

BCI conducted such an inquiry. After Mr. Grado conferred with Ms. Edgar of the Human Resource Department concerning Peters' plans to call in sick, Ms. Edgar and Ms. Pederson did several things that rise to the level of an inquiry. First, Ms. Edgar advised Mr. Grado to "find out what the situation was and, unless Mr. Peters had a compelling reason why he could not come to work, to order Mr. Peters to work on Sunday." *BCI Coca-Cola*, 450 F.3d at 492 (internal quotations omitted). Mr. Grado followed Ms. Edgar's advice and reported back to Ms. Edgar "exactly what had happened" when Mr. Grado spoke to Mr. Peters. *Id.* at 479-80. Indeed, it was Ms. Edgar who decided that Mr. Peters' behavior amounted to insubordination. *Id.* at 480.

The following Monday morning Ms. Edgar held several telephone conferences with both Mr. Grado and Ms. Pederson to discuss Mr. Peters' conduct. Next, at Ms. Edgar's direction, Ms. Pederson pulled Mr. Peters' file and found evidence of a 1999 incident in which Mr. Peters received a suspension and a "final warning" for insubordination from a different supervisor. *Id.* In the 1999 incident, Mr. Peters was ordered to work on Sunday; he refused and, according to the file, "was rude and unprofessional in his conduct." *Id.* (internal quotations omitted). Only after obtaining Mr. Peters' side of the story and finding evidence of the 1999 incident for which Mr. Peters was issued a final warning did Ms. Edgar decide to terminate Mr. Peters for insubordination. *Id.* These facts demonstrate that Ms. Edgar conducted an "inquiry"—she actively searched for and found evidence probative of the reliability of Mr. Grado's updates on his dealings with Mr. Peters.

In taking these steps, BCI Coca-Cola did what SHRM believes many non-discriminatory employers would have done in the absence of reasons know that Mr. Grado may have harbored a bias. While SHRM concedes that in some circumstances further inquiry may be preferable, there is no foundation in Title VII jurisprudence to mandate a specific process. To specifically require an "adequate investigation," including asking the employee his side of the story, would be to impose an unprecedented procedural requirement on private employers. An employee's right to be asked his version of events and the right to the benefits of an "adequate investigation" are rights enjoyed by public employees who are entitled to notice and a hearing prior to adverse action. In the private sector, unionized employees enjoy similar rights, but these are rights that an employee must specifically bargain for. The Tenth Circuit's holding implicitly establishes the right to be heard for all private employees. Such rights are unfounded in Title VII.

It should be noted that the Tenth Circuit misapplied its own "adequate investigation" standard. The Tenth Circuit recognized that Ms. Edgar instructed Mr. Grado to "find out what the situation was" and to talk to Mr. Peters and determine why he wouldn't be able to work on Sunday. *Id.* at 479. Ms. Edgar, through Mr. Grado, did ask Mr. Peters to explain his position, and the Tenth Circuit's conclusion that she "failed to take even the basic step . . . of asking Mr. Peters for his side of the story" is factually incorrect. *Id.* at 491.

B. The Tenth Circuit Overlooks Numerous Other Ways In Which Independence May Be Demonstrated

The collective experience of the human resources community teaches that an inquiry, while always sufficient to show independence, is not always necessary. Rather, human resource professionals need the flexibility and latitude to handle employment decisions in the most efficient and responsible manner under the circumstances. Often times, an inquiry

will not be the best way to establish the formal decisionmaker's independence.

1. Termination By The Formal Decisionmaker Pursuant to a Policy of Automatic Termination (e.g., a Zero-Tolerance Policy)

Some facts leading to an adverse employment decision are so apparent that no inquiry is required by the formal decisionmaker before taking the contemplated action. For example, a company may have a zero-tolerance drug policy in place and requires routine testing pursuant to a written policy. If the supervisor receives the lab results showing that the employee tested positive and forwards the results to the formal decisionmaker who promptly terminates the employee, no claim should lie against the employer even if the supervisor harbored race-based animus. The employer's decision was based entirely on the facts of the zero-tolerance drug policy and the positive test results. Under these circumstances, the supervisor's forwarding of the test results could hardly be said to compromise the independence of the formal decisionmaker's action.

In addition to policies of automatic termination, SHRM's experience is that, in the field of occupational safety and health, a formal decisionmaker may decide immediately to terminate an employee for a safety infraction. In such cases, the formal decisionmaker should be given the latitude to do so without inquiry—even if the decision is based entirely on a supervisor's report –if in doing so the formal decisionmaker acted in good faith furtherance of the safe and healthful conditions of the workplace.

Yet, the Tenth Circuit would require the employer to ask the employee his or her side of the story before taking any adverse action lest the employee later brings forth evidence that the supervisor was biased. Under the Tenth and Seventh Circuits' framework, the supervisor's animus would be imputed to the employer because (1) the supervisor's forward-

ing of a report was a cause of the termination, and (2) the employer did not conduct an "adequate investigation" that included asking the employee his or her side of the story. *BCI Coca-Cola*, 450 F.3d at 492. SHRM believes that in these situations, an inquiry is wholly unnecessary to the particular decision facing the employer and to conduct one would be a gross waste of corporate resources.

Lockheed Martin and *BCI Coca-Cola* are examples of this situation. In *Lockheed Martin*, Ms. Hill did not dispute the basis for any of the three reprimands issued to her by the "lead person" (Ms. Hill's direct supervisor). *Lockheed Martin*, 354 F.3d at 283. Of the three reprimands, one included a suspension. *Id.* at 282. Company policy provided that "an employee who receives a combination of two reprimands not involving a suspension and one involving a suspension . . . will be subject to discharge." *Id.* Upon issuing Ms. Hill her third reprimand, Mr. Dixon, the lead person, contacted the human resources department and inquired how to proceed under the automatic termination policy. *Id.* Mr. Dixon was told to follow company policy, which he did by forwarding Ms. Hill's disciplinary paperwork to his own supervisors who made the decision to terminate Ms. Hill. *Id.* Under these facts, in which the formal decisionmakers were acting pursuant to a policy of automatic termination, a thorough investigation was not necessary. However, Mr. Dixon's supervisors—the formal decisionmakers—did conduct an inquiry inasmuch as they reviewed Ms. Hill's file. This satisfied the court that they arrived at their decision independently.

Similarly, in the instant case, Mr. Peters was fired pursuant to a stated policy of automatic termination. Ms. Edgar instructed Mr. Grado to inform Mr. Peters that absent a compelling reason why he could not work on Sunday, Mr. Peters' refusal to work would be insubordination, which could result in termination. *BCI Coca-Cola*, 450 F.3d at 479. When Mr. Grado relayed to Ms. Edgar the contents of his Friday conversation with Mr. Peters, Ms. Edgar "determined at that time

that Mr. Peters' conduct in that conversation, standing alone, amounted to insubordination warranting termination." *Id.* at 480. Later, Ms. Pederson discovered that Mr. Peters' file contained a 1999 suspension and "final warning" for insubordination under strikingly similar circumstances. *Id.* A "final warning" is tantamount to a policy of automatic termination. In light of the facts of Mr. Peters' insubordination on the phone call with Mr. Grado and the 1999 final warning for insubordination, Ms. Edgar independently decided to file Mr. Peters. *Id.*

SHRM notes that the steps Ms. Edgar took reflect the realities of the workplace. In the absence of any reason to suspect Mr. Grado of bias, Ms. Edgar asked Mr. Grado additional questions, directed him to gather additional information, reviewed Mr. Peters' file, and made a decision to terminate Mr. Peters. Human resource professionals at larger employers cannot conduct full investigations for each termination.

2. *The Supervisor Does Not Advocate For a Particular Decision But Merely Reports Facts To or Seeks Advice From the Formal Decisionmaker*

The Court should look to the strength of the subordinate supervisor's advocacy as an indicator of whether the supervisor's behavior tends to make him or her one of several interdependent decisionmakers. In cases in which the supervisor in effect becomes an advocate for a particular decision and seeks to influence the formal decisionmaker, the court may need to look further for facts relating to the formal decisionmaker's independence. However, where a supervisor merely reports facts or seeks advice from the formal decisionmaker, an inquiry is unnecessary. The supervisor's only role in this scenario is to convey or receive information, not to influence the formal decisionmaker. Thus, there is no threat to the independence of the formal decisionmaker's actions.

In the leading cases in which the employee subordinate to the formal decisionmaker strongly advocated for the adverse employment decision, the reviewing court denied summary judgment for the employer. In *Reeves*, "Chesnut, along with Dana Jester, vice president of human resources, and Tom Whitaker, vice president of operations, recommended to company president Sanderson that petitioner and Caldwell be fired." 530 U.S. at 138. In *McKinney*, Mr. Ciulla, the subordinate employee, gave Ms. Jacobsen, the formal decisionmaker, "an ultimatum . . . that he would quit if Russell were not fired." 235 F.3d at 224. In *Shager*, "Lehnst recommended to Asgrow's 'Career Path Committee,' which reviews personnel action, that Shager be fired; and in July 1986, he was." 913 F.2d at 400.

In the lone case in which the subordinate employee did not advocate for a particular result but merely presented facts to the human resource department, the Fourth Circuit affirmed summary judgment for the employer. *Lockheed Martin*, 354 F.3d at 297. In *Lockheed Martin*, after Ms. Hill received her third reprimand which, under company policy, required automatic termination, her supervisor, Mr. Dixon, contacted his own supervisor, Mr. Griffin, to apprise him of the situation and "to obtain guidance on how to proceed." *Lockheed Martin*, 354 F.3d at 282. Mr. Griffin instructed Mr. Dixon to proceed under company policy, which required forwarding Ms. Hill's disciplinary paperwork to Mr. Griffin who, along with Mr. Prickett, made the decision to terminate Ms. Hill. *Id.* At no time did Mr. Dixon suggest or recommend to his superiors that Ms. Hill be terminated; rather, as the opinion makes clear, his contact with Mr. Griffin was limited to obtaining guidance on how to deal with a delicate employment matter.

In the instant case, Mr. Grado never advocated or suggested to Ms. Edgar or Ms. Pederson that Mr. Peters be terminated. In fact, the Tenth Circuit recognized that after Mr. Grado grew frustrated by Mr. Peters' refusal to work on

Sunday, Mr. Grado "decided to *seek advice* from the Human Resources Department." *BCI Coca-Cola*, 450 F.3d at 479 (emphasis added). Throughout his several conversations with Ms. Edgar, Mr. Grado merely recounted his dealings with Mr. Peters as he carried out Ms. Edgar's instructions, and he continually asked for advice on how to proceed in the matter. *Id.* at 479-80. At every step in the process that led to Mr. Peters' termination, Ms. Edgar was the sole decision-maker. She instructed Mr. Grado to inform Mr. Peters that his failure to work on Sunday without a compelling excuse was ground for termination; she concluded that Mr. Peters' remark to Mr. Grado during their Friday telephone call ("Do what you got to do and I'll do what I got to do") was insubordinate; and she decided that Mr. Peters should be terminated. *Id.* at 479-81. Mr. Grado's role in the process was merely ministerial, and it cannot be said to have compromised Ms. Edgar's independent decision to terminate Mr. Peters. The Tenth Circuit is therefore incorrect that "[Ms. Edgar's] investigation consisted of exactly one action: directing Ms. Pederson to pull Mr. Peters' personnel file." *Id.* at 492.

SHRM's approach yields results similar to those reached by the circuit courts, but it does so in a way that is faithful both to Title VII's intent requirement and the Court's holding in *Reeves*. The factors SHRM highlights as important for consideration in subordinate liability cases are the same factors that implicitly led the circuit courts to their decisions. An analysis of independent decisionmaking will answer the ultimate question of whether a subordinate supervisor's bias is attributable to the employer.

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit should be reversed, and the district court's grant of summary judgment for BCI Coca-Cola should be reinstated.

Respectfully submitted.

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